



UNHCR comments on the European Commission’s Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (“Dublin II”) (COM(2008) 820, 3 December 2008) and the European Commission’s Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, 3 December 2008)

INTRODUCTION

The Office of the United Nations High Commissioner for Refugees has closely observed the operation of the Dublin II Regulation¹ and associated instruments² (together referred to as the “Dublin system”) since their entry into force. While supporting mechanisms to ensure an efficient examination of asylum claims, UNHCR has voiced significant concerns regarding the system’s outcomes for persons seeking international protection in the EU and other participating States.³ These concerns include the system’s impact in many cases on the legal rights and personal welfare of asylum-seekers, including their rights to a fair claim examination and, where recognized, to effective protection, as well as the uneven distribution of asylum claims among Member States.

In highlighting these problems, UNHCR has noted that a basic assumption underlying the Dublin system is not yet fulfilled – namely, the premise that asylum-seekers are

¹ *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Official Journal (‘OJ’) L 050, 25/02/2003, p. 1-10, available at <http://www.unhcr.org/refworld/docid/3e5cf1c24.html> (hereafter “*Council Regulation (EC) No 343/2003*”).

² *Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention*, OJ L 316, 15.12.2000, p. 1-10, available at <http://www.unhcr.org/refworld/docid/3f4e40434.html>; and *Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention*, OJ L 62, 5.3.2002, p. 1-5, available at <http://www.unhcr.org/refworld/docid/3f4e3e2da.html>.

³ See list of UNHCR comments on the Dublin II Regulation and its predecessor Convention, as summarized in UNHCR, *The Dublin II Regulation: A UNHCR Discussion Paper*, April 2006, Part 1.4, p 11-12, available at <http://www.unhcr.org/refworld/docid/4445fe344.html> (hereafter “UNHCR (2006)”).

able to enjoy generally equivalent levels of procedural and substantive protection, pursuant to harmonized laws and practices, in all Member States.⁴ It is widely acknowledged, however, that even where EC asylum instruments have been transposed into national law, divergences continue between Member States,⁵ due in some cases, to inadequate transposition of EC law or, in others, to differing approaches to implementation. The result is that greater harmonization and a notable improvement in standards in some Member States continue to be needed before the basic assumption of equal access to protection in the EU can be validated.⁶ In some cases, demonstrated failures to respect the rights of Dublin returnees have been so significant that UNHCR has been compelled to recommend that asylum applicants should not be transferred to certain participating States. These recommendations have been made on the basis of rigorous analysis of access to and quality of the asylum procedure, reception conditions and other elements of the concerned State's system.⁷

For these reasons, UNHCR welcomes the EC's initiative to propose amendments to the Dublin instruments in order to "ensure that the needs of applicants for international protection are comprehensively addressed",⁸ including in "situations where there is an inadequate level of protection", as well as to enhance "efficiency" and deal with situations in which Member States do not have the capacity to deal with a significant number or sudden increase of asylum applications. In UNHCR's view, these goals can be pursued concurrently and consistently through appropriate amendments to the current instruments. In particular, greater efficiency need not and should not be sought at the expense of applicants' basic rights, through reducing or eliminating safeguards.

The following observations address first the proposals relating to the Dublin II Regulation, and second, those relating to Eurodac. References to articles refer to those in the relevant EC proposals, unless stated otherwise.

⁴ See UNHCR (2006), see above footnote 3, p 12.

⁵ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum. An Integrated Approach to Protection Across the EU*, COM(2008) 360, 17 June 2008, p. 3, available at <http://www.unhcr.org/refworld/docid/4860eee72.html>: "even after some legislative harmonisation at EU level has taken place, a lack of common practice, different traditions and diverse country of origin information sources are, among other reasons, producing divergent results".

⁶ UNHCR, *UNHCR's Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, p 38, available at <http://www.unhcr.org/refworld/docid/46e159f82.html>: "the Dublin system is predicated on the assumption that the asylum laws and practices of the participating States utilize common standards and produce comparable results", while "[i]n reality, asylum legislation and practice still vary widely from country to country",.

⁷ UNHCR, *UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation"*, 15 April 2008, available at <http://www.unhcr.org/refworld/docid/4805bde42.html>.

⁸ *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast)*, COM(2008) 820 final, 3 December 2008, p 1, paragraph 2, available at <http://www.unhcr.org/refworld/docid/493e8e3a2.html> (hereafter "COM(2008) 820 final").

**PART I: PROPOSAL FOR A RECAST DUBLIN II REGULATION
(COM(2008) 820, 3 DECEMBER 2008)**

1. Scope of the regulation

One of UNHCR's concerns around the Dublin system is whether it effectively achieves one of its primary aims, as expressed in Recital 5, to ensure that effective access to asylum procedures is guaranteed for all people in need of international protection. In this context, the existing Regulation defines an "application for asylum" as a "request for international protection", but limits it to requests for refugee status "under the Geneva Convention".⁹ This wording is inconsistent with the meaning of "international protection" in the Council Directive (EC) 2004/83 ("Qualification Directive").¹⁰

The proposal for a recast Article 1 would extend the scope of the existing Regulation in two ways. First, it would extend the Regulation's coverage in line with the other instruments of the Common European Asylum System ("CEAS") to encompass applications for all forms of "international protection" (recast Articles 1, 2, 3, 4, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 25, 32 and 44),¹¹ including both refugee status and subsidiary protection under the Qualification Directive.

Second, it is proposed to amend the Regulation to stipulate expressly that applications from stateless persons seeking international protection would be covered by Dublin (in proposed changes to Article 1; Article 2(c), (f), (g), (j), (l); Article 3(1); Article 15(1), (2); Article 16; Article 17(1); and Article 18(d)). There is no legal or other reason to treat differently applications for international protection by stateless persons. UNHCR therefore supports the proposed insertion of this reference, which removes any risk that claims for protection from stateless persons might be subject to dispute as regards responsibility.

In a further proposal that would effectively extend the Regulation's scope, Article 3(1) foresees that applications falling under the Dublin system will include those made not only in the territory and at the border, but also in "the transit zones" of Member States. UNHCR supports this proposal, as significant numbers of protection applications are made and dealt with in areas which are or are deemed to be "transit zones". Dublin should apply to ensure that there is clarity regarding the responsibility on the part of one participating State to examine and determine claims made in transit zones, and to eliminate the risk of removal without a substantive examination of the applicant's protection needs

⁹ *Council Regulation (EC) 343/2003*, see above footnote 1, Articles 1 and 2(c). The *Convention Relating to the Status of Refugees*, 28 July 1951, UN Treaty Series, vol. 189, p. 137, is available at <http://www.unhcr.org/refworld/docid/3be01b964.html> (hereafter "1951 Convention").

¹⁰ *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, OJ L 304 , 30 September 2004, p 12-23, available at <http://www.unhcr.org/refworld/docid/4157e75e4.html>.

¹¹ COM(2008) 820 final, see above footnote 8.

Scope of the Directive

UNHCR welcomes the proposed extension of the scope of the Dublin II Regulation to include all applications for “international protection”, including those made by stateless persons, and those made in “transit zones”.

2. Measures to enhance child protection and compliance with the Convention on the Rights of the Child

The current Regulation contains specific criteria which refer to the situation of minors and unaccompanied minors. However, practice has revealed that these provisions have not been sufficient to ensure that children are not prevented from reuniting with family members, or otherwise treated in accordance with their best interests.¹²

There are a number of proposals in the recast Regulation which aim to strengthen safeguards for children, including those separated from family members or other persons responsible for them, often referred to as “unaccompanied” or “separated” minors or children.¹³

2.1 Best interests of the child

UNHCR welcomes proposed new Article 6(1), creating a binding obligation under which “the best interests of the child shall be a primary consideration for Member States with respect to all procedures” under the Regulation. Proposed Recital 10 notes that this obligation is based on the UN Convention on the Rights of the Child (hereafter, “CRC”) and the Charter of Fundamental Rights, both of which bind most participating States. Article 6(3) also proposes a list of factors to be taken into consideration in determining a child’s best interests. UNHCR welcomes the concrete focus that this list gives to the obligation to respect the “best interests” principle. UNHCR “Guidelines on Best Interest Determinations” of May 2008¹⁴ can also assist States to establish an effective procedure and methods to carry out such determinations, including where relevant to fulfill their obligations deriving from Article 3 CRC.

2.2 Definitions of “minor” and “unaccompanied minor”

The proposed new definition of “minor” (Article 2(g)) also reflects the CRC, applying to all third country national and stateless persons under age 18 (Article 2(g)). UNHCR

¹² UNHCR (2006), see above footnote 3, part 2.3, p 21.

¹³ See Inter-Agency, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, January 2004, available at <http://www.unhcr.org/refworld/docid/4113abc14.html>, for definitions of ‘unaccompanied’ and ‘separated’ children. UNHCR recommends use of the terms ‘child/children’ and the definitions set out in the Inter-Agency Guidelines, to ensure greater accuracy and specificity of references to children in relevant circumstances. In these comments, however, the term ‘minor’ and ‘unaccompanied minor’ are used to reflect the language of the proposals.

¹⁴ UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at <http://www.unhcr.org/refworld/docid/48480c342.html> (hereafter “UNHCR Guidelines on Best Interest Determination”). Although these guidelines are primarily directed to UNHCR Offices and partners in the field, they will also potentially be of use to Dublin participating States.

supports this definition, as endorsed by the UNHCR Executive Committee in 2007.¹⁵ Aware that many States perceive that some applicants misrepresent their ages, UNHCR cautions against excessive reliance on age assessment techniques, which should only be used when age is disputed, bearing in mind the acknowledged margin of error of such techniques. Where it is not possible to determine definitively that an applicant is over 18 years of age, UNHCR encourages States to apply the benefit of the doubt and apply the provisions relevant to children in Dublin cases.¹⁶

Article 2(h) foresees an adjustment to the definition of “unaccompanied minor”, to delete the requirement for such a person to be “unmarried”. This amendment is justified given that the definition explicitly applies only to children who are unaccompanied by an adult responsible for them. As long as a child is unaccompanied, his/her personal status, as married or otherwise, is irrelevant.¹⁷ Other provisions which would extend the definition of “family members” would also provide important further safeguards for the rights of separated children (see section 3 below).

2.3 Entitlements of unaccompanied children: family tracing, representation and criteria

UNHCR considers that the proposals correctly emphasize the special circumstances and needs of unaccompanied children. Proposed Recital 10 calls for specific procedural guarantees for unaccompanied minors “on account of their particular vulnerability”, reflecting in practical terms the CRC obligation to make the child’s best interests a primary consideration.

UNHCR supports the obligation under recast Article 6(4) for States to trace family members or other relatives who may be present in the participating States, “whilst protecting his/her best interests”. The requirement for “appropriate training” (recast Article 6(5)) of authorities dealing with unaccompanied minors is also welcome, and reflects the specialized nature of children’s needs, as well as the complexity of gathering information and taking all steps necessary to determine responsibility for their asylum claims. This also acknowledges and allows more scope for addressing the child’s best interests, in accordance with proposed Article 6(1).

Proposed Article 6(2) obliges Member States to ensure that a “representative” assists the unaccompanied minor with all procedures under Dublin. The Article notes that this person may be the representative appointed under Article 23 of the Reception

¹⁵ UNHCR Executive Committee, *Conclusion on Children at Risk*, Conclusion No. 107 (LVIII), 5 October 2007, available at <http://www.unhcr.org/refworld/docid/471897232.html> (hereafter “ExCom Conclusion No. 107 (LVIII)”).

¹⁶ See also ExCom Conclusion No. 107 (LVIII), see above footnote 15; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, available at <http://www.unhcr.org/refworld/docid/3ae6b3360.html>; UNHCR Separated Children in Europe Programme, *SCEP Statement of Good Practice*, Third edition, 2004, available at <http://www.unhcr.org/refworld/docid/415450694.html>.

¹⁷ See also Save the Children (Europe), *Save the Children Comments on the Revision of the Dublin II Regulation*, 4 November 2008, p 4, available at www.savethechildren.net/alliance/europegroup/SC_Submissions_on_the_Revision_of_the_DublinIIRegulation.pdf.

Conditions Directive,¹⁸ which requires the appointment of “necessary” and “appropriate” representation. In its comments on the proposed recast of the Reception Conditions Directive,¹⁹ UNHCR has recommended the defining of a specific role and qualifications for guardians under recast Article 23 of that Directive. Such requirements could ensure more effective protection for the rights of children under the asylum instruments. UNHCR supports the proposal for appointment of a representative under Article 6(2), which could be enhanced by clearer requirements concerning guardians.

Under the Dublin procedure, to ensure that the child’s representative is fully able to assist in ensuring that the child’s legal rights are respected in the responsibility determination procedure, UNHCR notes that in many cases this will require a legally-qualified representative. While the type of representative to be appointed may vary with the child’s individual circumstances, the need for expert legal assistance should not be underemphasized. Moreover, it will be important to ensure that the representative is independent from the authorities responsible for implementing the Dublin Regulation.

The sequential hierarchy of criteria for responsibility for Dublin applicants, as proposed in the recast Regulation, would significantly strengthen the entitlements of unaccompanied children. Amendments proposed to Article 8(2) would establish an unequivocal obligation to take responsibility and would bind any Member State in which a relative who can take care of the unaccompanied child is legally present, provided this is in the child’s best interests.²⁰ UNHCR supports the proposals which would remove the remaining margin for discretion in the current Article 15(3). Proposed Article 8(3) would also resolve, on the basis of the child’s best interests, the question of which Member State is responsible in cases where relatives are present in more than one Member State.

3. Family unity

Substantial clarifications and amendments are proposed to the Regulation’s provisions on family members. A new Recital 11 would recall the right under the European Convention on Human Rights to enjoyment of family life, stating that respect for family unity should be a “primary consideration” for the application of the Regulation. In recast Recital 12, the insertion of new wording is proposed which underlines that the asylum applications of family members should be processed

¹⁸ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6 February 2003, p 18-25, available at <http://www.unhcr.org/refworld/docid/3ddcfda14.html> (hereafter “Reception Conditions Directive”). See also the *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers* (Recast), COM(2008) 815, 3 December 2008, available at <http://www.unhcr.org/refworld/docid/493e8ba62.html>.

¹⁹ UNHCR, *UNHCR Comments on the European Commission’s Proposal for a recast of the Directive laying down minimum standards for the reception of asylum seekers* (COM(2008) 815 final of 3 December 2008), 13 March 2009, available at <http://www.unhcr.org/refworld/docid/49ba8a192.html>.

²⁰ A proposed amendment to the Preamble, in the form of new Recital 13, also complements the recast Article 8(2) and underlines the importance for unaccompanied minors of the family unity principle, based on which a binding obligation to assume responsibility for an unaccompanied minor’s claim will attach to a Member State where a relative or carer is present.

together to ensure that families are not separated. UNHCR welcomes these proposals, which emphasize the importance of family unity.

3.1 Extension of the definition of “Family”

UNHCR supports the proposal to extend the definition of family members in recast Article 2(i)(ii) to include unmarried minor children regardless of whether they are dependent on the applicant; in subparagraph (iii) to include married minor children, where it is in their best interests to reside with the adult applicant; and subparagraph (iv) to include parents or guardians of a minor applicant who is married, where it is in the minor’s best interests to reside with the parent or guardian. A further important proposal in subparagraph (v) would extend the definition to include minor siblings of the applicant (including where the applicant or sibling is married, if it is in the best interests of one of them that they stay together). These changes are consistent with the CRC²¹ and the proposal in recast Article 6(1), requiring that the best interests of the child be a primary consideration in all Dublin procedures.

Based on UNHCR’s observation of the operation of the system, these changes would also help to prevent the separation of children from persons on whom they may be economically, socially or emotionally dependent; which is currently permissible under the Regulation. UNHCR has for instance documented cases in which minor siblings have been separated, resulting in severe and unwarranted hardships for the children. Separating children and other dependent persons from their carers may also result in a heavier burden on the State examining the dependent person’s asylum claim, as he or she is without the benefit of support and assistance from relatives.²²

UNHCR would recommend, however, a further modification of the definition to include adult siblings of a minor applicant, in cases where the applicant’s parents are not on the territory of a Member State. This would be a further means to ensure that children are not separated needlessly from family members (in this case, brothers or sisters) who are in the EU and who can care for them.²³

3.2 Responsibility determined with reference to the situation at the time of most recent application

Proposed Article 7(3) states that responsibility for asylum claims should be determined on the basis of the situation pertaining at the time when the asylum-seeker lodged his/her most recent application.

²¹ See *Convention on the Rights of the Child*, Articles 3, 9, 10, 18 and 22, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>.

²² The CRC imposes, under Article 20, obligations on States towards children deprived of their family environment. On the benefits of family reunification, see UNHCR, *Background Note for the Agenda Item: Family Reunification in the context of Resettlement and Integration*, Annual Tripartite Consultations on Resettlement, Geneva, 20-21 June 2001, paragraphs 35-43, available at <http://www.unhcr.org/protect/PROTECTION/3b30baa04.pdf>.

²³ See UN Committee on the Rights of the Child, *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, paragraph 40, third point, available at <http://www.unhcr.org/refworld/docid/42dd174b4.html>; and UNHCR Guidelines on Best Interest Determination, see above footnote 14.

This amendment should ensure that family life is respected and that the determination of responsibility is made on the basis of the most accurate and current facts, taking into account possible changes in the whereabouts and status of family members. This could also, for example, give better practical effect to the obligation proposed in Article 6(4) to trace family members of unaccompanied minors, who are present in the participating States. If those family members are found only at the time of the application (which may be after the time when the minor first enters the EU, or is first detected as present without authorization), their presence should be taken into account in determining responsibility.

3.3 Family members who are applicants for international protection

Proposed Article 10 seeks to clarify obligations under present Article 8 regarding family members with pending applications in different Member States. However, the proposed changes do not remove the scope for all of the variant interpretations which are currently given to the present Article, and which have led to family members being separated, for instance, in cases where an applicant is still in the Dublin procedure, or awaiting review of an admissibility decision.²⁴ To clarify this issue, it is proposed that recast Article 10 be amended to state that a Member State shall be responsible for claims from family members of an applicant, where it has not yet reached a final decision on the applicant's claim.

3.4 Dependent relatives

UNHCR would support the proposed amendment to the responsibility criteria relating to dependent relatives. In recast Article 11(1), it is foreseen that responsibility will attach in cases where an applicant is dependent upon the assistance of a relative due to pregnancy, maternity, serious illness or handicap, or old age (or where the relative depends upon the applicant). In such cases, the Member State responsible shall be that considered "most appropriate" for keeping or bringing these persons together, subject to the consent of the persons concerned, and taking into account their best interests, including for example, ability to travel.

UNHCR welcomes the strengthening of this provision, currently contained in the optional "humanitarian" clause in Article 15. The risk of unnecessary hardship – as well as potential additional costs and inconvenience for Member States – is reduced by this clear attribution of responsibility based on objectively demonstrable relationships of dependency. UNHCR has observed significant problems have occurred where States have failed to take sufficient account of dependency in considering whether to assume responsibility under optional Article 15 as it stands.²⁵

UNHCR would however advocate an adjustment to the proposal's wording to provide that while responsibility will attach in all dependency situations listed in Article 11(1), that list should not be exhaustive. Furthermore, in practice, UNHCR would support a flexible approach to the application of the recast provision, if adopted, so

²⁴ See UNHCR (2006), see above footnote 3, part 2.3.2.1, p 25-27.

²⁵ See UNHCR (2006), see above footnote 3, part 2.3.3.2; See also ECRE, *The Dublin Regulation: Twenty Voices – Twenty Reasons for Change*, 20 March 2007, available at http://www.ecre.org/files/Dublin_20_voices.pdf.

that applicants and dependents would not bear an excessively heavy burden of proof of dependency.

Family unity

- *UNHCR supports the proposals to extend the definition of “family member” in Article 2(i), specifically to take account of children’s best interests and the dependency upon parents/guardians/other relatives that may remain even in cases where children are married. These changes reflect international law and the vulnerability of children.*
- *Recast Article 2(i) should be modified to add a further category of family members, namely adult siblings of minor applicants, in cases where a parent of the applicant is not present in the territory of a Member State.*
- *Recast Article 7(3) should be amended to include a proviso that its application should under no circumstances lead to or continue the separation of family members.*
- *Recast Article 10 should be amended to provide that Member States shall be responsible for the claims of family members of applicants whose applications have “not yet been the subject of a final decision regarding the substance...”*
- *UNHCR would welcome adoption of proposed Article 11(1), pursuant to which a binding responsibility criterion is proposed in situations where an applicant is dependent upon a relative in another Member State (or vice versa). UNHCR recommends amendment of the proposal to specify that the list of dependency situations in recast Article 11(1) is not exhaustive, through insertion of the word “including” after “Where the asylum-seeker is dependent on the assistance of a relative...”*

4. Discretionary clause

The proposal to replace current Articles 3(2) (known as the “sovereignty clause”) and 15 (the “humanitarian clause”) with the recast Article 17, to be titled the “discretionary clause”, would provide additional flexibility to States. It allows them greater scope to assume – or request other States to assume - responsibility where the circumstances of the case so warrant.

4.1 Requirement for consent

UNHCR considers that the discretionary clause, based on its humanitarian objective, should not be used by States solely for administrative, cost- or time-saving reasons, particularly where these run counter to humanitarian or compassionate imperatives.²⁶ The consent requirement can help to ensure that the discretionary clause is not used simply to facilitate speedy rejection of claims, without reference to humanitarian circumstances. In UNHCR’s view, application of this Article against the will of the applicant would contradict the explicit “humanitarian and compassionate” objective of the provision.²⁷

²⁶ UNHCR (2006), see above footnote 3, part 2.3.3, p 30-35.

²⁷ UNHCR (2006), see above footnote 3, part 2.3.3.1, p 31; some Member States use the sovereignty clause if it would be more expeditious and cheaper to examine and reject the claim than to transfer the applicant to another Member State.

In terms of the administrative consequences of this proposal, obtaining consent of applicants should not impose a heavy burden on Member States. Given the proposed requirement for authorities to carry out an interview in all Dublin II cases under recast Article 5, consent could be requested as part of the interview process.

4.2 Scope of humanitarian and compassionate circumstances

UNHCR supports the proposed amendment in Article 17(1) (presently Article 3(2)), which provides States with the option of deciding to examine a claim for “humanitarian or compassionate reasons”, going beyond family relationships and potentially extending to any situation where individual hardship would result from a Dublin transfer.

UNHCR welcomes this broad concept of “humanitarian and compassionate” cases, which also encompasses people who are, for example, socially, economically or emotionally dependent upon others to whom they are not related by blood or marriage.

UNHCR also welcomes proposed Article 17(2), which permits States to examine claims of extended family members on humanitarian grounds, including in non-dependency situations.

4.3 Deadlines for making and replying to requests

UNHCR welcomes the fact that no deadline is set for the making of requests based on humanitarian or compassionate grounds, given that these can arise or become known at any time. However, as regards responses to requests to take charge of a case under recast Article 17(2), the proposed deadline of two months for Member States appears reasonable. The need of Member States for sufficient time to examine and substantiate the humanitarian grounds for taking charge is acknowledged, and will ensure that decisions are taken in an informed way.

Discretionary clause

- *UNHCR supports the proposal to extend the scope for Member States to assume responsibility for a claim under recast Article 17(1), extending beyond family reunification to other “humanitarian and compassionate” circumstances.*
- *The proposed requirement for the applicant’s consent is crucial to ensure that the humanitarian character of this provision is preserved. Given its nature and aims, the discretionary clause should not be applied against the applicant’s consent simply in order to secure cost, administrative or other advantages unrelated to compassionate grounds.*
- *While welcoming the proposal in Article 17(2) to enable States to request others to take charge of cases, UNHCR proposes that the grounds for such requests be extended beyond cases involving family ties, to the wider category of “humanitarian and compassionate” cases, as foreseen in proposed Article 17(1).*

5. Temporary suspension of transfers

UNHCR has consistently drawn attention to the imbalances created by the strict implementation of the Dublin system, and agrees with the need to consider ways to counterbalance the system's outcomes with a responsibility-sharing mechanism. While it is acknowledged that Dublin II of itself is not conceived as a responsibility-sharing instrument, its consequences in particular for States at the external borders of the EU²⁸ warrant consideration of arrangements to address the additional demands it may place upon the capacity of their reception or asylum systems.

UNHCR has sought to draw attention to the fact that while certain States may face the considerable challenge of dealing with responsibility for greater numbers of asylum applications as a result of Dublin, the system can also have significant negative effects upon individual applicants for international protection. This is particularly so when asylum systems are not able to function effectively and ensure respect for the claimants' legal rights.

5.1 Ensuring access to asylum rights

A mechanism for temporary suspension of transfers, as proposed in recast Article 31, would help to address such problems. By allowing States which are under strain to request short-term relief from their responsibilities under the Dublin Regulation - or allowing the Commission or another participating State to act where the affected State is unable or unwilling to fulfill its obligations - the proposal offers a guarantee that the operation of the Regulation will not serve to return people to dysfunctional or overstretched asylum systems. Rather, their claims would be dealt with by a State which is equipped to meet its responsibilities under the asylum *acquis*. This is confirmed by proposed Article 31(6), which provides that the Member States in which applicants with suspended transfers are present "shall be responsible" for examining their applications. While this would increase the number of applications to be examined by the State hosting the affected applicants during the period of temporary suspension, it has the significant benefit of ensuring that people are not denied their basic right to a full and fair asylum claim determination.

5.2 Opportunity for affected Member States to seek assistance

The proposal also seeks to offer a reasonable opportunity to States facing significant numbers of claims based on Dublin to request assistance. The commitment to "solidarity" on the part of other Member States is expressed in proposed Article 31(7), indicating that temporary suspension shall justify the granting of financial assistance under EC "emergency measures" provisions.

²⁸ *Commission Staff Working Document Accompanying the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), Impact Assessment, SEC(2008) 2962, 3 December 2008, p 75, available at <http://www.unhcr.org/refworld/docid/49997ad90.html>.*

5.3 Measures to ensure swift resolution of problems leading to suspension

In view of the additional responsibility that will necessarily be placed on other Member States during the period of temporary suspension, consideration should be given to ensuring that the situation is resolved swiftly. To this end, UNHCR suggests that the current proposal be strengthened with additional requirements to ensure that the State to which transfers are suspended is compelled to remedy the situation and assume its responsibilities as quickly as feasible. It should not be possible, under an amended Regulation and in accordance with proposed Article 31(9), for a State to absolve itself of its obligations without being bound to take concrete steps to address the problems. In case of failure to do so, steps should be taken. This approach would be consistent with proposed Article 31(9) which clarifies that Article 31 shall not be interpreted “as allowing Member States to derogate from their general obligation to take all appropriate measures to ensure fulfillment of their obligations” under Community legislation on asylum.

UNHCR notes that the proposed recast Article 31 enables the Commission to attach conditions to any decision to suspend transfers (Article 31(4)(d)). However, in the event that these conditions are not fulfilled within a reasonable time, there should be measures which provide the necessary incentive for the concerned State to comply. Ideally, the mechanism through which these conditions are enforced should operate automatically, with default steps and defined timeframes, to reduce the need for politically contentious discussion or decisions.

In cases where a State fails to fulfill the conditions attached to a suspension, or otherwise to remedy the situation that led to the suspension, encouragement to resolve the matter could be exerted, for example, through the compulsory referral of the case to the conciliation mechanism contained in recast Article 35. That conciliation mechanism is a “peer” process, involving three Member States not connected to the subject matter of the proceeding. While temporary suspensions under proposed Article 31 should not normally constitute or lead to a “dispute” related to the application of the Regulation under recast Article 35, there will be situations in which the considered views of other Member States may help to identify a solution.

The proposal in the recast Regulation to broaden the scope of the existing conciliation mechanism (under present Article 14) suggests that there is potential for its wider use. If after a prescribed, limited period a solution is not found through conciliation, the Commission could be asked to examine whether there might be potential grounds for infringement proceedings. Such provision would naturally not limit in any way the Commission’s power to consider initiating infringement action at any time on any grounds. However, there could be advantages in explicitly averring to the possibility.

Temporary suspension of transfers

- *UNHCR supports the concept of a mechanism allowing for temporary suspension of transfers, in the situations foreseen in proposed Articles 31(1), 31(2) and 31(3). This will ensure that while such a situation persists, applicants are not exposed to the risk of violations of their rights due to overburdened reception capacities, asylum systems or infrastructure, nor other factors which “may lead to a level of protection... not in conformity” with the Reception Conditions or Asylum Procedures Directives.*

- | |
|---|
| <ul style="list-style-type: none">- <i>UNHCR would propose strengthened provisions in Article 31 to compel the State to which transfers are suspended to take effective and timely steps to remedy the situation.</i> |
|---|

6. Obligation to examine claims

Proposed Article 18(2) addresses one of the most significant and widely-discussed problems observed in the application of the current Regulation. As documented by UNHCR and others, one Member State previously interpreted the Regulation as permitting it to treat the claims of applicants taken back as “interrupted”, with the consequence that no further examination of the merits took place. The European Commission initiated infringement proceedings before the Court of Justice challenging the practice and associated national provisions, but discontinued the action after the Member State amended its national law to abolish the “interruption” procedure.

UNHCR welcomes the proposal for a recast Article 18(2) which clarifies the obligation of a responsible Member State to “take charge” or “take back” cases (under recast Article 18(1)), to “examine or complete the examination of the application”. This formulation should clarify, without scope for ambiguity or misinterpretation, that a full examination and assessment of the substantive grounds of the claim and evidence must take place, and a determination rendered, including in “take back” cases. In situations where an examination may have been discontinued after express or implied “withdrawal” of the application, Article 18(2) moreover obliges the responsible State to revoke the discontinuation decision and “complete the examination”. In UNHCR’s view, this is an important and necessary clarification that will reduce the risk that applicants subject to Dublin may not receive a full and fair asylum determination in a Dublin participating State.

However, there may also be cases in which an applicant’s claim may have been rejected during his/her absence under Dublin for a variety of technical or formal reasons beyond his/her control (where, for example, an applicant may have missed a deadline for reporting). In such cases, even if the claim has not formally been classified as “withdrawn”, it should nevertheless be possible to receive a full examination of the claim upon return under Dublin. To achieve this, recast Article 18(2) should be modified to omit ‘following its withdrawal by the applicant’.

<p><i>Completion of examinations</i></p>

- | |
|---|
| <ul style="list-style-type: none">- <i>UNHCR welcomes the proposed changes in recast Article 18(2), which would clarify the obligation of all States to complete or resume a full examination on the merits of all applications for which they are responsible.</i>- <i>In order to cover the full range of cases in which an applicant’s claim should receive a full examination of the substance after transfer, UNHCR proposes deletion of the words “following its withdrawal by the applicant.”</i> |
|---|

7. Right to information and notification of transfer decisions

The proposed changes to recast Article 4 foresee extension of Member States’ current obligations to provide information about the Dublin system to applicants. These new

requirements should be seen as helping Member States to ensure the more efficient operation of the Dublin system, as well as increasing its overall credibility. If applicants are better informed about the system, its rationale and potential outcomes, they will be better equipped to provide Member States with the information needed to facilitate determination of responsibility. Better understanding of the process, and the fact that it should ultimately provide a fair outcome, could also encourage greater cooperation with the system on the part of applicants.

7.1 Information about criteria, procedures and outcomes

UNHCR supports the proposals for specific information to be provided by authorities, including in particular the obligation to furnish information about the Dublin criteria and their hierarchy (Article 4(1)(b)), which should encourage applicants to provide full information; the “general procedure and time-limits to be followed by Member States” (Article 4(1)(c)), providing clarity and reducing uncertainty about when further developments might be expected; the “possible outcomes of the procedure and their consequences” (Article 4(1)(d)); and the “possibility to challenge a transfer decision” (Article 4(1)(d)), which offers applicants a greater opportunity to exercise their rights in appropriate cases.

7.2 Information in writing/appropriate to age

The obligation to provide such information in writing under Article 4(2) is welcome. The proposed common leaflet under Article 4(3) would also contribute to more effective and more consistent understanding across Member States, and UNHCR stands ready to contribute to the preparation of such material. However, in many cases there remains a need for verbal explanations to supplement written information.²⁹ UNHCR thus supports the wider obligation under Article 4(3) to convey details orally, “where necessary for the proper understanding of the applicant”. Other forms of communication should also be considered, such as information provided by video in at least one Member State.³⁰

Also positive is the requirement for Member States to “provide the information in a manner appropriate to the age of the applicant”. UNHCR considers that such information should be made available in “a language that the applicant understands” rather than one that s/he “is reasonably supposed to understand”. In the absence of actual understanding, the information provided is of little value.

7.3 Information regarding transfer decisions

Under Article 25, changes are also foreseen to provisions relating to notification of transfer decisions under Dublin. UNHCR supports the proposal in recast Article 25(1) to require notification in writing within fifteen days of receipt of the reply from a Member State which is asked to accept responsibility. As above, UNHCR advocates

²⁹ Verena Plutzar, *Kommunikationswege in Erstaufnahmestellen für AsylwerberInnen*, komm.weg, October 2008, available at http://www.sprachenrechte.at/TCgi/Images/sprachenrechte/20090316115827_Studienergebnisse.komm.weg.Oktober%202008_1.pdf.

³⁰ This is the practice in the United Kingdom.

that this be in “a language the applicant understands”. Further obligations to provide information are foreseen in recast Article 25(2), including a description of the procedure’s main steps, available remedies and applicable time-limits, as well as information on “persons or entities that may provide specific legal assistance and/or representation” (recast Article 25(2)). These could contribute to ensuring that applicants are aware of, and in a better position to exercise, their legal entitlements under Dublin. (See further below on “effective remedies”).

Information and notification of transfer decisions

- *UNHCR welcomes the proposal for provision of more extensive information about the Dublin system under Article 4. In addition to enhancing the applicants’ understandings of their rights and the possible outcomes, these changes should encourage applicants to provide complete information to authorities, which should facilitate the task of determining the responsible State.*
- *Clearer and expanded requirements concerning the notification of transfer decisions are also welcomed, in proposed changes to Article 25.*
- *In all of the above provisions, UNHCR proposes that the wording “in a language that the applicant is reasonably supposed to understand” be amended to “in a language the applicant understands”.*

8. Personal interviews

The newly-explicit requirement proposed in Article 5 for Member States to conduct a personal interview with all Dublin applicants will, in UNHCR’s view, contribute to more efficient administration of the Dublin system as well as greater understanding and capacity on the part of applicants to present their claims. As noted in proposed Article 5(2), it shall serve to enable the applicant to “submit relevant information necessary for the correct identification of the responsible Member State”, including potentially relating to the presence of family members or relatives in other Member States, or the holding of a visa or residence permit.

Article 5(2) also defines “informing the applicant orally about the application of this Regulation” as a further purpose of the interview. In UNHCR’s view, this obligation extends beyond requirements to provide general information regarding Dublin in Article 4(1), and requires the responsible authorities to advise the applicant specifically during the interview of the intention to apply the Regulation to his/her case and potentially request his/her transfer to a particular State. This is essential to enable the applicant to rise, for example, circumstances which may preclude his/her transfer to a particular State on protection grounds; and/or clarify circumstances which help in identifying the responsible Member State. To ensure that the interview yields the maximum information for both parties, the requirement for its conduct “in a language the applicant is reasonably supposed to understand” should be amended to “in a language that the applicant understands”. If this formulation is not used in other parts of the Regulation, it should feature in this provision, given the potentially crucial nature of the interview for the entire responsibility-determining process.

The interview requirement could help to ensure more effective fulfillment of Article 6(1) of the recast Regulation, as well as Article 3 of the CRC, by ensuring that the

authorities have an opportunity to learn of presence of a child or parent, and determine whether reunification is in the child's best interests.

In States which do not currently conduct such interviews, the benefits of more extensive information, made available "in a timely manner following the lodging of an application" (Article 5(3)), would outweigh additional resources required to undertake such interviews.³¹

Interview

- *UNHCR welcomes the requirement to conduct a personal interview in all Dublin cases, in which applicants are informed of the proposed application of the Regulation to their case and possible transfer to a particular State. Given the potential value of the interview to the responsibility-determining process, this is in the interest of the State as well as the applicant.*
- *To ensure maximum effectiveness of the interview for all parties, UNHCR proposes that the wording "in a language that the applicant is reasonably supposed to understand" be amended to "in a language the applicant understands". This is particularly important for the interview, potentially more than any other procedural element of the Dublin process.*

9. Effective remedy against transfer

Proposed new Article 26 concerns the right of applicants to an effective remedy in fact and law, in respect of a transfer decision, before a court or tribunal. Under a new proposed provision, Member States must also provide for "a reasonable period of time" during which the right to appeal may be exercised (Article 26(2)). Proposed Recitals 16 and 17 recall that the right to an effective remedy derives from and is defined in Community, international and regional law, including the Charter of Fundamental Rights and the case-law of the Strasbourg court.³²

While the automatic suspensive effect of Dublin transfers is not required, the proposals would oblige Member State authorities to examine within seven days whether the applicant shall have a right to remain pending the appeal; and in case of refusal, to provide reasons in writing (Articles 26(3) and (4)). UNHCR supports these proposals, which would enable an applicant to demonstrate why, in the circumstances of his/her particular case, transfer prior to an appeal decision may prejudice his/her legal rights. This provision reflects the jurisprudence of the European Court of Human Rights³³ and the European Court of Justice.

New provisions in recast Article 26(5)-(6) entitling appellants to legal assistance and/or representation where necessary (without cost to the applicant where s/he does

³¹ UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate*, September 2005, Chapter 4.3, available at <http://www.unhcr.org/publ/PUBL/4316f0c02.html>.

³² Key reference cases regarding effective remedy under ECHR include, among others, *Jabari v. Turkey*, Application No. 40035/98, 11 July 2000 (ECtHR), available at <http://www.unhcr.org/refworld/docid/3ae6b6dac.html>.

³³ *Conka v. Belgium*, Application No. 51564/99, 5 February 2002 (ECtHR), available at <http://www.unhcr.org/refworld/docid/3e71fdfb4.html>; *Gebremedhin c. France*, Application No. 25389/05, 26 April 2007 (ECtHR), available at <http://www.unhcr.org/refworld/docid/46441fa02.html>.

not possess the means to pay) are also supported. These provisions recognize the importance of legal assistance for enabling applicants to exercise appeal rights in practice.

Effective remedies

UNHCR supports the proposal to require an effective remedy in Dublin cases which includes a “reasonable period of time” in which to exercise the right to appeal, and to enable the applicant to demonstrate why, in his/her particular cases, suspensive effect may be warranted. The proposal to require the provision of legal assistance for appeals against Dublin decisions is also welcome.

10. Detention

Freedom from arbitrary detention is a corollary of the fundamental human right of liberty and security of the person.³⁴ UNHCR welcomes the proposed new safeguards and limitations on the use of detention in Dublin proceedings. These would appear to be necessary in light of the practice of a number of Member States which use detention on a systematic basis for Dublin claimants.³⁵

10.1 Justifications for detention

Proposed Article 27(1) would prohibit detaining an applicant for the sole reason that s/he has applied for international protection. UNHCR supports this provision³⁶ as a means to reduce the risk of arbitrary detention,³⁷ and recalls that Article 31 of the 1951 Convention provides that penalties, including detention³⁸ shall not be imposed on refugees and asylum-seekers for unauthorized entry or stay, provided they present

³⁴ See, among other things, Article 5 of the European Convention on Human Rights, available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>; Article 9 of the Universal Declaration of Human Rights, available at <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>; Article 9 of the International Covenant on Civil and Political Rights, available at <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>; Article 37(b) of the Convention on the Rights of the Child, available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>; and Article 14 of the Convention on the Rights of Persons with Disabilities, available at <http://www.unhcr.org/refworld/docid/4680cd212.html>.

³⁵ UNHCR (2006), see above footnote 3, part 2.7 (b), p 52-53.

³⁶ This provision is also consistent with Article 17 of the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, OJ L 326, 13 December 2005, p 13-34, available at <http://www.unhcr.org/refworld/docid/4394203c4.html> (hereafter “Asylum Procedures Directive”).

³⁷ See Article 9 of the Universal Declaration of Human Rights, see above footnote 34, and Article 9 of the International Covenant on Civil and Political Rights, see above footnote 34.

³⁸ Although “detention” is not explicitly mentioned in Article 31(1) of the 1951 Convention, the term “penalties” was meant by the drafters to include it. Article 31(2) authorizes administrative detention for the purpose of carrying through an investigation. See also paragraph 29 of G Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, October 2001, at <http://www.unhcr.org/protect/PROTECTION/3bcfdf164.pdf>.

themselves without delay and show good cause for their illegal entry or presence, save under exceptional circumstances.³⁹

UNHCR also welcomes the obligation proposed under recast Article 27(3) for Member States to consider alternatives to detention, as well as the introduction of a necessity test, allowing for detention of applicants only “when it proves necessary, on the basis of an individual assessment of each case” and only “if there is a significant risk of absconding”. The proposal for a definition of “risk of absconding” under Article 2(1), requiring reasons “based on objective criteria defined by law” would represent a limiting device which could also ensure greater consistency and rigour in Member States’ use of detention in Dublin cases. UNHCR is concerned that the possibility remains that Member States take a wide view of what constitutes such a risk. However, it should not be possible under such a formulation to determine that the mere fact of being subject to the Dublin Regulation creates a risk of absconding that justifies detaining the applicant.

10.2 Obligation to inform detainees of the reasons for detention

The obligation in recast Article 27(7) to inform detained persons immediately of “the reasons for detention (...) in a language they are reasonably supposed to understand” falls short of the obligation under Article 5(2) of the European Convention on Human Rights, which states that “Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and any charge against him”. This provision has been interpreted by the European Court of Human Rights as requiring the person to be informed in simple and non-technical language of the reasons for detention so that s/he can, if necessary, challenge its lawfulness before a court,⁴⁰ and that, for instance, general statements are not sufficient.⁴¹ The proposal should thus require reasons for detention to be furnished in a language that the applicant understands.

10.3 Duration and judicial review

UNHCR supports the proposal to restrict detention in Dublin cases to the shortest period possible (Article 27(5), and to permit it only from the moment of notification of a decision to transfer (recast Article 27(4)). In many cases of transfer, it may be determined that little or no risk of absconding arises before that point.

UNHCR further welcomes proposals for strengthened requirements for regular judicial review of detention (in recast Article 27(8)), to ensure on the one hand that that detention is proportionate, imposed or prolonged only where necessary, and in line with permissible grounds; and on the other hand, that all procedural safeguards are respected. The requirement for detention to be ordered or confirmed within 72

³⁹ See also UNHCR Executive Committee, *Detention of Refugees and Asylum-Seekers*, Conclusion No. 44 (XXXVII), 13 October 1986, available at <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>.

⁴⁰ *Fox, Campbell and Hartley v. United Kingdom*, Application Nos. 12244/86, 12245/86 and 12383/86, 30 August 1990 (ECtHR), available at <http://www.unhcr.org/refworld/docid/3ae6b6f90.html>.

⁴¹ *Saadi v. United Kingdom*, Application No. 13229/03, 29 January 2008 (ECtHR) paragraph 85, available at <http://www.unhcr.org/refworld/docid/47a074302.html>.

hours by judicial authorities (recast Article 27(6)) should offer an appropriate safeguard to prevent arbitrary or systematic detention in Dublin cases.

UNHCR considers it important that the asylum-seeker is entitled to request judicial review of his/her detention whenever new circumstances arise or information becomes available which may affect the lawfulness of his/her detention. Such wording would be in accordance with Article 5(4)⁴² of the European Convention on Human Rights.

The reference to possibilities for judicial review of “continued” detention in recast Article 27(8) could give rise to misunderstanding. UNHCR understands this is intended to cover both the legality of detention during the initial period for which detention has been ordered and its prolongation. For reasons of clarity, UNHCR proposes deletion of the word “continued”.

Detention

- *Recast Article 27(7), subparagraph 2, should be amended as follows to bring it in line with ECHR obligations and ECtHR caselaw: “Detained persons shall immediately be informed of the reasons for detention, the intended duration of the detention and the procedures laid down in national law for challenging the detention order, in a language they understand.”*
- *UNHCR proposes amendment of recast Article 27(8) as follows: “In every case of a detained person pursuant to paragraph 2, the ~~[delete: continued]~~ detention shall be reviewed ex officio by a judicial authority at reasonable intervals and on request of the person concerned, whenever circumstances arise or new information becomes available which affects the lawfulness of detention”.*

11. Data protection

The proposed recast Regulation incorporates a number of amendments aimed at protecting applicants’ data. UNHCR welcomes, as a general principle, the insertion of several processes and limitations which would prevent the unauthorized use or dissemination of information concerning individual applicants and their claims. Confidentiality of data is particularly important for refugees and other people in need of international protection, as there is a danger that agents of persecution or rights violations may ultimately gain access to such information, potentially exposing a refugee to danger even in his/her asylum country.

UNHCR thus welcomes the foreseen confirmation, in new proposed Recital 23, that Community instruments for the protection of individuals regarding processing of their personal data apply also to data processing under Dublin. Furthermore, Recital 24 underlines that the aim of data exchange under the Regulation is to assist and protect applicants. UNHCR supports the proposal to impose explicit limits on the extent and nature of data to be exchanged among Member States prior to transfers (recast Article 30). A proposal in Article 32(9) is welcome to enable an applicant to bring a legal

⁴² Article 5(4) ECHR states: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

action in the event that a Member State refuses to provide access to the applicant's own data, or correct or delete that information as required, as in a specific proposed article on criminal penalties which will apply in case of any misuse of data processed under the Regulation (recast Article 36). Other minor changes aimed at strengthening wording on data protection for applicants are also welcome, and should be seen as increasing the transparency, accountability and reliability of the data management systems of participating States.

12. Reception conditions

A report prepared for the European Commission in 2006 by the Odysseus Academic Network⁴³ documented varying interpretations by Member States of their obligations to apply the terms of the Reception Conditions Directive to applicants subject to Dublin.

Several Member States, according to the Odysseus report, took the view that Dublin applicants were not entitled to the minimum reception conditions established by the Reception Conditions Directive. UNHCR is concerned by this finding, given the risk that asylum-seekers do not enjoy minimum standards of treatment for prolonged periods, while responsibility for their claims is being determined.⁴⁴

Proposed Recital 9 of the recast Regulation seeks to address this gap, noting that “in order to ensure equal treatment of all asylum-seekers”, the Reception Conditions Directive “should apply” to the Dublin procedure. It is noted that the current proposal for revision of the Reception Conditions Directive contains a related proposal which would clarify that the Reception Conditions Directive will apply “during all stages and all types of procedures concerning applications for international protection and in all locations and facilities hosting asylum-seekers” (proposed Recital 13).

UNHCR welcomes these clarifications, and supports the insertion of the new recitals in both instruments, to remove any scope for interpreting Dublin II or the Reception Conditions Directive as mutually exclusive.

Entitlement of Dublin applicants to reception conditions

UNHCR welcomes the proposed recast Recital 9, clarifying that all applicants subject to Dublin are entitled to the treatment, standards and facilities laid down in the Reception Conditions Directive.

⁴³ Odysseus Academic Network for Legal Studies on Immigration and Asylum in Europe, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States*, October 2006, available at <http://www.unhcr.org/refworld/docid/484009fc2.html> (hereafter “Odysseus report”).

⁴⁴ This situation could be construed as a violation of the International Convention on Economic, Social and Cultural Rights (available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>), including under Articles 11, 12 and 13.

13. Transfers

A proposed new Recital 19 encourages Member States to promote voluntary transfers and ensure that “supervised or escorted transfers are undertaken in a human[e] manner, in full respect for fundamental rights and human dignity”. This new recital, along with proposed new operative provisions in the recast Regulation seek to address a number of problems encountered under existing rules. After some well-documented cases⁴⁵ where the wrong applicant was transferred and disputes ensued among Member States regarding responsibility, the recast Article 28(3) helpfully clarifies that the transferring Member State “shall promptly accept that person back”. The previously-unaddressed question of who should bear the costs of transfer is covered in proposed Article 29, clarifying that the transferring State bears costs of re-transfer in cases of error (Article 29(2)). UNHCR welcomes these provisions, which should enhance efficiency and reduce scope for disagreement among Member States. They also clarify that applicants shall not be compelled to bear the costs of transfer in any case (Article 29(3)).

New provisions also guard against the transfer of people in poor health or otherwise not “fit for transfer” (Article 30(1)). More detailed regulation of information-sharing among States in preparation for transfer is also foreseen. UNHCR welcomes proposals to limit the information to be exchanged to that which is “appropriate, relevant and non-excessive for the sole purpose...” of ensuring that the applicant receives “adequate assistance” including medical care and protection for his/her rights (Article 30(2)). This is particularly important, as the primary purpose of information sharing should be to protect the rights and well-being of applicants subject to transfer.

UNHCR welcomes the obligations conferred upon transferring and receiving Member States under Article 30, which should facilitate transfers by clarifying the respective obligations of those States and limiting scope for disagreement about the applicant’s situation and needs. Additional requirements, including for the consent of applicants or their representatives to the transmission of personal health information (Article 30(5)), and safeguards on its processing (Article 30(6) and (9)) are also welcome.

Transfers

- *UNHCR welcomes proposed provisions to regulate more closely the conduct of transfers, including in particular issues of costs and exchange of information related to applicants prior to their transfer, and the sharing of information, to protect the rights and well-being of applicants.*
- *In addition to providing necessary safeguards for applicants, UNHCR considers that these proposals would improve the efficiency and rate of transfer, by explicitly defining States’ obligations and reducing the likelihood of delays and obstruction of transfers due to error and misinformation.*

⁴⁵ UNHCR, *The Dublin II Regulation. A UNHCR Discussion Paper*, April 2006, p 42-43, available at <http://www.unhcr.org/refworld/docid/4445fe344.html>.

14. Cessation of responsibility and further applications

The Regulation provides that the responsibility of a State shall cease (unless that State has issued a residence permit to the applicant) in cases where the applicant leaves the territory of the Member States for at least three months (recast Article 19(2)). Recast Article 19(3) would amend a related provision, clarifying that responsibility would also cease in cases of voluntary compliance with a removal order after withdrawal or rejection of a claim. In both provisions, further proposed amendments are foreseen which clarify that any application lodged after such an absence or removal should be regarded as a new application (and, by implication, no longer subject to the responsibility determination made in the first proceeding).

This is a positive proposal, which has the potential to resolve potential problems of proof by a previously responsible State that its obligations have ceased. Moreover, it could address the situation in which an individual whose application for protection is rejected and/or who leaves the EU may, years later, be at risk of persecution or other serious harm in new circumstances, and may have reason to seek asylum once again. It would be inappropriate in such cases for a previous determination of responsibility – based on past, potentially no-longer-relevant facts, to limit the applicant’s right to a determination in a particular Member State with which s/he may have no continuing connection.

Cessation of responsibility

UNHCR welcomes the proposal to clarify Article 19 regarding cessation of responsibility for Dublin cases, and the obligation to treat as new applications any claims lodged after removal, rejection or withdrawal.

15. Right of Member States to transfer to a safe third country

A change is proposed in recast Article 3(3), which at present permits Member States to transfer applicants, under national law, to third countries. UNHCR welcomes the proposal to insert the word “safe” before “third country”, and the requirement to respect safeguards as set out in the Asylum Procedures Directive.

In theory, under the present Regulation, States could argue that they retain discretion to transfer a person to any third State. However, UNHCR has advocated consistently for a limited application of the “safe third country” concept, including in Community legal instruments. The restrictions on the concept’s application in the Asylum Procedures Directive must be respected at least as minimum standards.

16. Time limits

UNHCR welcomes the proposal to introduce time limits for requesting another State to take back an applicant under recast Article 23, amending the existing Article 20. In UNHCR’s view, these changes serve more effectively to ensure that the objective of

determining swiftly the State responsible for a claim (recast Recital 5) is achieved, in the interests both of applicants and Member States.⁴⁶

PART II: PROPOSAL CONCERNING THE ESTABLISHMENT OF 'EURODAC' (COM(2008) 825/3, 3 December 2008

UNHCR notes that the proposals contained in the recast Eurodac Regulation are largely technical in nature, and do not in the main raise issues of principle regarding access to asylum procedures, fairness or the protection of applicants under the Dublin system. For this reason, UNHCR's comments on the recast Eurodac Regulation are therefore limited.

17. Confidentiality and management of personal data

UNHCR welcomes proposals to ensure greater data security in Eurodac, including the insertion of obligations for each Member State to put in place a security plan designed physically to protect data; deny access for unauthorized persons; and prevent the unauthorized use, reading, copying or input of data, amongst other things (Article 19). The particular vulnerability of asylum-seekers to dangers which could result from publication of data demand high standards of confidentiality and security.

Other provisions aimed at ensuring the "more efficient management of deletions" are also supported, on the grounds that they will ensure that sensitive information is not retained in the database longer than necessary, notably after the issuance of a residence permit or the individual's departure from the Member States.

18. Publication of lists of authorities accessing Eurodac data

The recast Regulation foresees extended obligations for Member States regarding designation of authorities entitled to access to Eurodac. Recast Article 20(2) requires more detailed designations of those so authorized, specifying the "exact unit" responsible for tasks related to the Eurodac Regulation. In a new provision, the lists of authorities with access to Eurodac, which Member States are obliged to make available, will be published, along with regular updates, in the Official Journal.

UNHCR welcomes this proposal, as a means to improve transparency and accountability of those managing asylum-seekers' data. In view of intensive debates in recent years about the merits or otherwise of making available Eurodac data to authorities other than those responsible for asylum matters, including law enforcement bodies, UNHCR emphasizes the need for increased safeguards around the Eurodac system.

⁴⁶ The recent ECJ decision of *Migrationsverket v. Petrosian and Others*, Case C-19/08, 29 January 2009, available at <http://www.unhcr.org/refworld/docid/498964e32.html>, highlights some of the difficulties associated with time limits for "take back" requests under Article 20(1) as it stands (although that case was confined to the question of interpreting the six month period for transfer in suspensive appeal cases).

UNHCR has repeatedly expressed its concerns⁴⁷ that proposals to make available Eurodac data to law enforcement bodies would increase the risk of stigmatization of asylum-seekers and raise concerns about discrimination. It would also involve a significant departure from the purpose of Eurodac, which is designed to facilitate the application of Dublin and therefore assist in identifying the State responsible for determining an asylum claim. As such, it was not designed with the kinds of safeguards required to protect the data of people registered therein, and their information remains highly vulnerable. Provisions such as those proposed in the current recast appear likely to improve the security and confidentiality of the system in the short term. However, should the idea re-emerge of extending Eurodac access to law enforcement authorities or other wider groups, detailed scrutiny of the kinds of safeguards required would be essential.

19. Data on persons granted asylum

The proposal foresees a change in the handling of data stored regarding people who are granted asylum in a Dublin participating State. Article 14 proposes that a State which grants protected status to an applicant shall be required to “mark” the data in Eurodac. As a result, it should be possible for other States to search those data sets, and, in case of a hit, obtain the information that the person in question has received asylum.

The rationale for this proposal is set out by the Commission in its explanatory memorandum. It is argued that some people who have received asylum in one State can (and do) apply at present for asylum in another. This is seen as contrary to “the principle of having only one Member State responsible”. The ability to search Eurodac and determine whether a claimant already has found protection elsewhere is seen as necessary to prevent claimants from moving on to ask once again for protection in another State.

The phenomenon which this amendment seeks to address highlights two remaining gaps in the EC legal framework on asylum. First, it appears that people granted protection are seeking to move from one Member State to another within the EU – a right that should have been available to them, through regular means, under the proposed extension to the Long-Term Residence Directive, on which Member States failed to agree in November 2008.⁴⁸ That proposal foresaw increased rights of free movement and residence within the Union for refugees and subsidiary protection beneficiaries after five years of lawful residence. However, in the absence of agreement, protection beneficiaries remain considerably disadvantaged by comparison with other lawfully residing third country nationals, as they are precluded from moving from one Member State to another. The phenomenon of new asylum claims in

⁴⁷ UNHCR, UNHCR’s Recommendations to the Slovenian Presidency of the European Union, January - June 2008, 10 December 2007, available at <http://www.unhcr.org/refworld/docid/476beab22.html>.

⁴⁸ *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, OJ L 16, 23 January 2004, p 44–53, available at <http://www.unhcr.org/refworld/docid/4156e6bd4.html>. See also *Proposal for a Council Directive Amending Directive 2003/109/EC to Extend Its Scope to Beneficiaries of International Protection*, COM(2007) 298 final, 6 June 2007, available at <http://www.unhcr.org/refworld/docid/466e5b582.html>.

other Member States as referred to in proposed Article 14 appears as a reaction to these ongoing limits on free movement – further adding to the urgency of the need for a legal instrument to resolve them.

Secondly, the proposal to “mark” data of people granted status represents the closest step taken so far towards mutual recognition of positive asylum decisions. At present in the EU, Member States effectively recognize each others’ negative decisions, through their readiness to enforce removal orders issued by other Member States, and the Dublin rules requiring States to “take back” applicants they may have rejected in the past (and subsequently enforce their decisions, potentially through removal). By contrast, Member States do not at present recognize or agree to accord any legal rights to people granted status in other Member States, and no proposal is under consideration at present to facilitate this.

Through the proposal to mark data stored on refugees, Member States would effectively acknowledge that the decisions of others are valid and result in Community rights. However, these decisions are recognized only for the negative purpose of declining a second asylum application, and not for the positive purpose of acknowledging the holder’s status and entitlements. This selective approach suggests an inconsistent application of legal logic to the detriment of refugees. Further consideration should be given in the next phase of legislation to addressing this.

CONCLUSION

UNHCR acknowledges the legal and technical complexity of the amendment proposals for Dublin, as well as the sensitive political environment in which they have been issued. Some Member States currently argue strongly in favour of merits of the system as it stands, while others would seek greater efficiency in the form of more and more rapid transfers. There is also a third group of States and other stakeholders, including UNHCR, that perceive pressing needs for the current system to be reinforced with more safeguards for the rights of applicants. As a close observer of the system over many years, UNHCR believes that the need to fill protection gaps is urgent. UNHCR also considers that the efficiency of the system can be improved without sacrificing procedural and substantive rights. UNHCR urges Member States and institutions to take part constructively in the negotiations with these dual objectives in view.

UNHCR
18 March 2009